FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 10 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
1095 Market Street,
San Francisco 3, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

Respondent's brief in opposition largely begs the question; and, in its last paragraph, inaccurately applies Rule 19 of this Court.

1. On page 4 respondent says: "The issue has been stripped of all prospective importance by recent legislative action." This is a stock argument in opposition to petitions for certiorari; in this case it is directly contrary to the facts.

As pointed out in our petition, the 1958 legislation put employees of non-appropriated agencies under the Longshoremen's and Harborworkers' Compensation Act; this act establishes the same basic system with exactly the same problems as existed when Forfari was injured. The question under the Longshoremen's

Compensation Act, as it was under the California compensation act, is whether placing these employees under an act insuring private employers and allowing third party tort feasor suits, indicates an intention *not* to treat them as employees of the United States, and consequently permitting them to sue the United States as third party tort feasor in a proper case.

2. So it is a non sequitur when respondent says at pages 5-6 "Thus, there can be no doubt that, under present law, employees such as petitioner are granted a compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act and that, by virtue of the express exclusivity provision in the 1958 amendment of 5 U.S.C. 150k-1, no *additional* remedy may be sought against the United States under the Tort Claims Act."

Both the Longshoremen's and Harborworkers' Act and the California Act provide for third party tort feasor's suits; so such a suit is *not an additional* remedy.

3. Likewise at the foot of page 7 respondent says:

> "In *Johansen*, the Court held that, since the injuries of a civilian seaman were covered by the Federal Employees Compensation Act suit would not lie against the Government under the Public Vessels Act . . ."

But Forfari was not under the Federal Employees Compensation Act, nor are non-appropriated employees at the present time under that act. The question of the case is, whether the operation of the applicable private compensation acts is the same or different from that of the Federal Employees' Compen-

sation Act. Respondent's quotation simply begs that question.

4. Respondent again begs the question and completely loses its way when it says at page 8:

> "But petitioner does not suggest, as he cannot, why Congress should have wanted to give employees of non-appropriated fund agencies *greater rights against the Government* than those possessed by other categories of Federal Employees." (Italics added.)

This assumes the question at issue—whether the system of compensation made applicable to these employees indicates an intention that they shall not be employees of the United States from the standpoint of on-the-job injuries.

As a corollary, it is a misconception to talk about "greater rights". The third party tort feasor suit runs against some one *other than the employer*. If the United States is the employer, the right runs against *any one else*. If the United States is *not* the employer, the right may run against the United States.

To say that there is a "greater" right against the Government, is to assume that the Government is the employer, and that there are two remedies *against the employer*. As we have shown, this assumes the very question of the case.

5. Respondent says at page 4:

> "These agencies are permitted to employ the funds which their activities produce rather than covering (sic) them into the Treasury and then withdrawing them by appropriation."

and then on page 9:

> "Having received these compensation benefits *from the Government,* through its own instrumentality petitioner, a federal employee, cannot . . . maintain this damage suit against the Government" (Italics added.)

But what respondent here says of the non-appropriated agencies *is true of all private enterprise.* Private corporations pay some taxes, but otherwise "are permitted to employ the funds which their activities produce rather than covering (sic) them into the treasury and then withdrawing them by appropriation". But a payment by a private corporation out of funds which "its activities produce" and which it is "permitted to employ"—*is not considered to be a payment by the Government.*

So a payment out of the profits of the non-appropriated agencies *is not a payment by the government.* This much was held even by *Aubrey v. U. S.*, 254 F. 2d 768, 771—quoted at page 14 of our petition:

> "The cost of such protection would be paid out of the proceeds of these self-supporting activities and *not out of public funds.*" (Italics added.)

The difference between the non-appropriated agencies and private business is that of control. This was held decisive in *Standard Oil Co. v. Johnson*, 316 U.S. 481, where there was no legislative (or other federal) expression to the contrary.

Placing non-appropriated employees under private compensation acts, however, puts the emphasis not on control but on the source of funds. This is indicated

by the very language of the government's brief in opposition (pp. 4, 9, quoted above) and of *Aubrey v. U. S.*, 254 F. 2d 768, 771, quoted above.

By making source of funds the test, and by withdrawing these employees from the Federal Employees' Compensation Act, an intention is manifested to assimilate them with private business rather than with the government. Under these circumstances they can sue the United States as a third party tort feasor on appropriate facts.

6. In its last paragraph on page 9, respondent says, that since the decisions in the Second and Seventh Circuits are by District Courts, "There is accordingly, no such conflict between the courts of appeals as would warrant review by this court."

Rule 19 is cited. This clearly does not follow. Rule 19 explicitly provides:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

7. The petition should be granted as prayed for.

Dated, San Francisco, California,
November 5, 1959.

Respectfully submitted,

GEORGE OLSHAUSEN,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
Of Counsel.